

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL KLEEBERG, LISA STEIN and
AUDREY HAYS,

Plaintiffs,

vs.

LESTER EBER; ALEXBAY, LLC f/k/a
LESTER EBER, LLC; CANANDAIGUA NATIONAL
CORPORATION d/b/a CANANDAIGUA NATIONAL
BANK & TRUST; ELLIOT W. GUMAER, JR.;
EBER BROS. & CO., INC.; EBER BROS. WINE AND
LIQUOR CORPORATION; EBER BROS. WINE &
LIQUOR METRO, INC.; EBER-CONNECTICUT,
LLC ; and WENDY EBER

Defendants.

**DEFENDANT, CNB d/b/a
CANANDAIGUA NATIONAL
BANK'S ANSWER WITH
AFFIRMATIVE DEFENSES¹**

Civ. Action No.: 1:16-cv-09517-LAK

Honorable Lewis J. Kaplan

Defendant, The Canandaigua National Bank and Trust Company, incorrectly sued as Canandaigua National Corporation d/b/a Canandaigua National Bank & Trust's ("CNB"), by and through its attorneys, Woods Oviatt Gilman LLP, as and for its Answer to the Complaint of Plaintiffs Daniel Kleeberg, Lisa Stein and Audrey Hays, states as follows:

1. As to Paragraph 1 of the Complaint, Defendant, CNB admits the allegations contained therein.
2. As to Paragraph 2 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.
3. As to Paragraph 3 of the Complaint, Defendant, CNB denies the allegations contained therein.

¹ Plaintiffs have incorrectly named the Trustee. The Canandaigua National Bank and Trust Company served as Trustee and is a national banking association.

4. As to Paragraph 4 of the Complaint, Defendant, CNB denies the allegations contained therein.

5. As to Paragraph 5 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

6. As to Paragraph 6 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

7. As to Paragraph 7 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

8. As to Paragraph 8 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

9. As to Paragraph 9 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

10. As to Paragraph 10 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

11. As to Paragraph 11 of the Complaint, Defendant, CNB admits it was a Co-Trustee of the Trust beginning in 2007 and actively managed the publicly held assets contained in the Trust. At no time did CNB actively manage the shares of Eber stock. It is unclear from Paragraph 11 of the Complaint as to the meaning or definition of "at all relevant times" and therefore CNB lacks information sufficient to admit or deny the allegation pertaining to that undefined period.

12. As to Paragraph 12 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

13. As to Paragraph 13 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

14. As to Paragraph 14 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

15. As to Paragraph 15 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

16. As to Paragraph 16 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

17. As to Paragraph 17 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

18. As to Paragraph 18 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

19. As to Paragraph 19 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

20. As to Paragraph 20 of the Complaint, Defendant, CNB admits the allegations contained therein.

21. As to Paragraph 21 of the Complaint, Defendant, CNB admits the allegations contained therein.

22. As to Paragraph 22 of the Complaint, Defendant, CNB admits the allegations contained therein.

23. As to Paragraph 23 of the Complaint, Defendant, CNB admits that CNB was a Co-Trustee with Gumaer and Lester Eber beginning in 2007 and was a Co-Trustee until June 1, 2017 when the Monroe County Surrogate issued an Order for Final Judicial Settlement of

the Final Account of CNB and lacks information sufficient to either admit or deny the balance of the allegations contained therein as CNB did not actively manage the Eber assets.

24. As to Paragraph 24 of the Complaint, Defendant, CNB admits the allegations contained therein.

25. As to Paragraph 25 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

26. As to Paragraph 26 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

27. As to Paragraph 27 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

28. As to Paragraph 28 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

29. As to Paragraph 29 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

30. As to Paragraph 30 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

31. As to Paragraph 31 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

32. As to Paragraph 32 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

33. As to Paragraph 33 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

34. As to Paragraph 34 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

35. As to Paragraph 35 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

36. As to Paragraph 36 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

37. As to Paragraph 37 of the Complaint, Defendant, CNB admits the allegations contained therein.

38. As to Paragraph 38 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

39. As to Paragraph 39 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

40. As to Paragraph 40 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

41. As to Paragraph 41 of the Complaint, Defendant, CNB admits the allegations contained therein.

42. As to Paragraph 42 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

43. As to Paragraph 43 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

44. As to Paragraph 44 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

45. As to Paragraph 45 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

46. As to Paragraph 46 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

47. As to Paragraph 47 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

48. As to Paragraph 48 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

49. As to Paragraph 49, together with subparts a-c, of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein. As to subparts d-h, CNB has a copy of the documents referenced, but lacks information sufficient to either admit or deny the validity of the documents and therefore the allegations contained therein, as CNB is not a party to said documents.

50. As to Paragraph 50 of the Complaint, Defendant, CNB denies making any false statements to any New York Court and lacks information sufficient to either admit or deny the balance of the allegations contained therein.

51. As to Paragraph 51 of the Complaint, Defendant, CNB admits the allegations contained therein.

52. As to Paragraph 52 of the Complaint, Defendant, CNB admits the allegations contained therein.

53. As to Paragraph 53 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

54. As to Paragraph 54 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

55. As to Paragraph 55 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

56. As to Paragraph 56 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

57. As to Paragraph 57 of the Complaint, Defendant, CNB denies the allegations contained therein.

58. As to Paragraph 58 of the Complaint, Defendant, CNB admits the letter contained that language.

59. As to Paragraph 59 of the Complaint, Defendant, CNB denies the allegations contained therein.

60. As to Paragraph 60 of the Complaint, Defendant, CNB admits that the cover letter referenced therein does not mention the operating business or the disposition of Eber-Conn and CNB denies the balance of the allegations contained therein.

61. As to Paragraph 61 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

62. As to Paragraph 62 of the Complaint, Defendant, CNB admits that the article attached as Exhibit F contains the allegation set forth therein.

63. As to Paragraph 63 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

64. As to Paragraph 64 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

65. As to Paragraph 65 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

66. As to Paragraph 66 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

67. As to Paragraph 67 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

68. As to Paragraph 68, together with subparts a-d, of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

69. As to Paragraph 69 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

70. As to Paragraph 70 of the Complaint, Defendant, CNB repeats and realleges each and every paragraph above as if fully set forth herein.

71. As to Paragraph 71 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

72. As to Paragraph 72 of the Complaint, Defendant, CNB admits the allegations contained therein.

73. As to Paragraph 73 of the Complaint, Defendant, CNB admits the allegations contained therein.

74. As to Paragraph 74 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

75. As to Paragraph 75 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

76. As to Paragraph 76 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

77. As to Paragraph 77 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

78. As to Paragraph 78 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

79. As to Paragraph 79 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

80. As to Paragraph 80 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

81. As to Paragraph 81 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

82. As to Paragraph 82 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

83. As to Paragraph 83 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

84. As to Paragraph 84 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

85. As to Paragraph 85 of the Complaint, Defendant, CNB admits the allegations contained therein.

86. As to Paragraph 86 of the Complaint, Defendant, CNB denies the allegations contained therein.

87. As to Paragraph 87 of the Complaint, Defendant, CNB lacks sufficient information to either admit or deny any allegations relating to Gumaer and admits that it did not question the alleged transfer or obtain an appraisal as CNB was not managing the Eber corporate entities or actively managing the corporate assets.

88. As to Paragraph 88 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

89. As to Paragraph 89 of the Complaint, Defendant, CNB admits the allegations contained therein.

90. As to Paragraph 90 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

91. As to Paragraph 91 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

92. As to Paragraph 92 of the Complaint, Defendant, CNB denies the allegations pertaining to CNB contained therein and lacks information sufficient to either admit or deny the balance of the allegations contained therein.

93. As to Paragraph 93 of the Complaint, Defendant, CNB repeats and realleges each and every paragraph above as if fully set forth herein.

94. As to Paragraph 94 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

95. As to Paragraph 95 of the Complaint, Defendant, CNB admits the allegations contained therein.

96. As to Paragraph 96 of the Complaint, Defendant, CNB admits the allegations contained therein.

97. As to Paragraph 97 of the Complaint, Defendant, CNB admits the allegations contained therein.

98. As to Paragraph 98 of the Complaint, Defendant, CNB admits the allegations contained therein.

99. As to Paragraph 99 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

100. As to Paragraph 100 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

101. As to Paragraph 101 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

102. As to Paragraph 102 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

103. As to Paragraph 103 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

104. As to Paragraph 104 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

105. As to Paragraph 105 of the Complaint, Defendant, CNB denies the allegations contained therein.

106. As to Paragraph 106 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

107. As to Paragraph 107 of the Complaint, Defendant, CNB repeats and realleges each and every paragraph above as if fully set forth herein.

108. As to Paragraph 108 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

109. As to Paragraph 109 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

110. As to Paragraph 110 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

111. As to Paragraph 111 of the Complaint, Defendant, CNB repeats and realleges each and every paragraph above as if fully set forth herein.

112. As to Paragraph 112 of the Complaint, Defendant, CNB admits the allegation that the right to an accounting is premised on the existence of a fiduciary relationship, but does not understand the balance of the allegations and, therefore, lacks information sufficient to either admit or deny the balance of the allegations..

113. As to Paragraph 113 of the Complaint, Defendant, CNB admits Plaintiffs have an interest in the trust but lacks information sufficient to either admit or deny the balance of the allegations contained therein.

114. As to Paragraph 114 of the Complaint, Defendant, CNB admits that it was a fiduciary to Plaintiffs beginning in 2007 through June 1, 2017 and further admits that Lester Eber and Gumaer were fiduciaries to the Plaintiffs. The phrase “all relevant times” is not defined and therefore CNB lacks information sufficient to either admit or deny the allegations relating to “all relevant times.”

115. As to Paragraph 115 of the Complaint, Defendant, CNB admits the allegations contained therein.

116. As to Paragraph 116 of the Complaint, Defendant, CNB admits the allegations contained therein.

117. As to Paragraph 117 of the Complaint, Defendant, CNB lacks information sufficient to either admit or deny the allegations contained therein.

118. Denies each and every other allegation heretofore not admitted, denied or otherwise controverted.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE
DEFENDANT CNB ALLEGES AS FOLLOWS**

119. Repeats and realleges each and every paragraph above as if fully set forth herein.

120. The Complaint fails to state a claim for which relief may be granted against CNB.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE
DEFENDANT CNB ALLEGES AS FOLLOWS**

121. Repeats and realleges each and every paragraph above as if fully set forth herein.

122. Some or all of the claims against CNB are barred by the applicable statute of limitations.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE
DEFENDANT CNB ALLEGES AS FOLLOWS**

123. Repeats and realleges each and every paragraph above as if fully set forth herein.

124. The claims against CNB are barred by the doctrine of waiver, laches, and estoppel.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE
DEFENDANT CNB ALLEGES AS FOLLOWS**

125. Repeats and realleges each and every paragraph above as if fully set forth herein.

126. On or about March 8, 2017, Plaintiffs were served with a citation from the Monroe County Surrogate's Court noticing CNB's submission of its Final Accounting as Successor Co-Trustee.

127. Plaintiffs never appeared or otherwise objected to the jurisdiction of the Monroe County Surrogate's Court or to the Final Accounting filed by CNB.

128. On June 1, 2017, the Monroe County Surrogate issued an Order for Judicial Settlement of Final Account of Successor Co-Trustee, Resignation and Discharge of Co-Trustee and Termination of the Trust.

129. Some or all of the Plaintiffs' claims have been released and are barred by the collateral estoppel, *res judicata* or other applicable issue preclusion doctrines.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE
DEFENDANT CNB ALLEGES AS FOLLOWS**

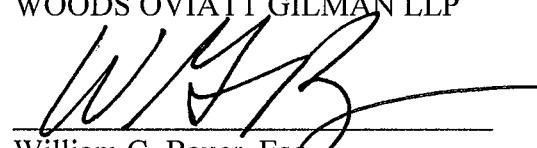
130. Repeats and realleges each and every paragraph above as if fully set forth herein.

131. Plaintiffs have failed to mitigate their alleged damages.

Defendant, CNB reserves the right to assert additional affirmative defenses in the event discovery discloses the existence of same.

WHEREFORE, Defendant, CNB respectfully requests judgement in its favor ordering dismissal with prejudice of all claims of the Complaint and granting such other, further and different relief as the Court deems just and proper.

Dated: October 20, 2017

WOODS OVIATT GILMAN LLP

By: _____
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